SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

OCTOBER TERM 19[illegible]

No. 543

THE DETROIT EDISON COMPANY,
RALPH WERTZ and HERBERT KNACK,
Petitioners,

v.

EAST CHINA TOWNSHIP SCHOOL DISTRICT No. 5,
DONALD MacDONALD, LELAND [illegible],
[illegible]PS, MILTON J. GRABING, EDWIN H. [illegible],
[illegible]NCOLN G. SIMONS and WILLIAM [illegible],
individually and as members of the Board of
Education of said school district,
Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[illegible]
[illegible]

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1967

No. .....

THE DETROIT EDISON COMPANY,
RALPH WERTZ and HERBERT KNACK,
Petitioners,

v.

EAST CHINA TOWNSHIP SCHOOL DISTRICT No. 3, DONALD MacDONALD, LELAND SASS, MARY PHILLIPS, MILTON J. GEARING, EDWIN H. LINDOW, MALCOLM G. SIMONS and WILLIAM HOPSON, individually and as members of the Board of Education of said school district,
Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners The Detroit Edison Company, Ralph Wertz, and Herbert Knack hereby petition this honorable court for a writ of certiorari to review a judgment and opinion of the United States Court of Appeals for the

Sixth Circuit rendered in this cause on June 2, 1967, and respectfully show:

## (a) OPINIONS IN THE COURTS BELOW

The District's Court's opinion: *The Detroit Edison Company v. East China Township School District No. 3* (November 6, 1965), 247 F. Supp. 296. Copy of the opinion and judgment attached as Appendix A.

The Court of Appeals' opinion: *The Detroit Edison Company v. East China Township School District No. 3* (June 2, 1967), not yet reported. Copy of the opinion and judgment attached as Appendix B.

## (b) JURISDICTION OF THIS COURT

The judgment sought to be reviewed was dated and entered June 2, 1967. No application for rehearing was made. The statute conferring on this court jurisdiction to review such judgment by writ of certiorari is 28 U.S.C. 2101.

## (c) QUESTIONS PRESENTED FOR REVIEW

1. A state statute commits to the electorate the question of whether two populous and debt-burdened school districts should be annexed to a third sparsely-settled and debt-free district, according to the electors of the two districts to be annexed the right to vote by direct popular suffrage and according to the electors of the annexing district only the right to speak through their previously-elected school board. As will be shown in the following statement of facts (e), the so-called "annexing district" was not the moving party though it might so appear from the phrase. The so-called "annexed districts" were the real movers. Is this an unconstitutional discrimination against the electors of the annexing district? And is it unconstitutional particularly in view of the following additional circumstances?

2. The same statute commits to the electorate the question of whether property in the debt-free district shall thereafter become liable for the debts of the debt-burdened districts. As defendants construe the statute the electorate consists of the electors in the debt-free district (of whom there are 900)voting in common with the electors of the debt-burdened districts (of whom there are 8338). In other words, the legislature has combined St. Clair and Marine City so that they may vote to impose their debts on East China. Is this an unconstitutional discrimination against the electors of East China?

3. Are the individual plaintiff-voters without standing to raise the foregoing questions in the federal courts if they do not show a pecuniary loss of $10,000?

4. Is this a proper case for the abstention doctrine?

## (d) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal Constitutional provision involved is the Fourteenth Amendment, Section 1 (equal protection). The Michigan statutes involved are Sections 431, 438 and 444 of Act 269 of the Public Acts of 1955 as amended, cited as Compiled Laws of 1948, secs. 340.431, 340.438 and 340.444, also cited as Michigan Statutes Annotated 15.3431, 15.3438 and 15.3444. The verbatim text of these sections of the state statutes is attached as Appendix C.

## (e) CONCISE STATEMENT OF THE CASE

The Marine City School District had an area of fifty-one square miles, 3800 electors, an assessed valuation of $19,663,743, and an outstanding bonded indebtedness of $1,775,597 (mostly for the erection of a new high school). The adjacent St. Clair School District had an area of twenty-seven square miles, 4538 electors, an assessed valuation of

$18,687,709, and an outstanding bonded indebtedness of $1,493,000 (also mostly for the erection of a new high school). The adjacent East China School District had an area of twelve square miles, 900 electors, an assessed valuation of $81,953,904, and no bonded indebtedness. Its high assessed valuation was in large part attributable to one parcel of property, the petitioner Edison's generating plant. Petitioners Knack and Wertz are electors and property owners in the East China District.

The complaint (so far unanswered) charges that defendants entered into a conspiracy to transfer to property assessed in East China most of the tax burden encumbering the property assessed in Marine City and St. Clair, the conspiracy to be carried out under color of the unusual provisions of the local law. What defendants now claim to have accomplished is shown by the following table:

| | *Former Debt Burden* | *Supposed New Debt Burden* |
|---|---|---|
| Marine City District..... | $1,455,000 | $ 457,000 |
| St. Clair District..... | 1,320,000 | 406,000 |
| East China District..... | —0— | 1,809,000 |
| Annexed abandoned districts | —0— | 103,000 |
| | $2,775,000 | $ 2,775,000 |

The provisions of the local law were these. Section 431 of the state school law provided that one school district might be annexed to another by the affirmative vote of the school board of the annexing district and the affirmative vote of the electors of the annexed district. Section 438 provided that the combined district should assume the bonded indebtedness of the annexed distirct when the electors of the combined district should adopt two propositions, one for such debt assumption and the other for a

waiver of the state constitution's limitation on *ad valorem* taxation. Section 444 related to so-called unlimited tax liability bonds, being school bonds which by a special exception in the state constitution were exempt from the *ad valorem* tax limitation; most of the bonded indebtedness of these districts was of this type. As to such bonded indebtedness Section 444 provided that no tax limitation waiver proposition need be voted by the electors of the district proposing annexation, and that the debt assumption proposition should be approved by the electors "of either or both districts as the case may be." The full text of these statutory sections appears in the appendix.

The complaint charges that in furtherance of their conspiracy defendants brought about the following events: The Marine City and St. Clair districts proposed that they be annexed to the East China District. The Marine City and St. Clair electors, voting separately, approved such annexation. No election was held in the East China district, but its school board voted three to two to approve such annexation, notwithstanding written protests filed by a majority of the East China electors. The East China board members had been elected to office a long time before the annexation issue was raised. The state courts held (in 1962) that a valid annexation was accomplished: *Detroit Edison Co. v. East China School District,* 366 Mich. 638, 115 N.W. 2d 298. The state courts did not consider the questions now raised.

Thereafter at successive elections the voters were asked to approve the assumption of the Marine City and St. Clair bonds by the combined district, and to give a necessary tax limitation waiver. At all such elections both propositions were rejected by the East China voters by large majorities. At the first election both propositions were rejected even when the ballots of all three districts were

counted together, as defendants claimed the right to do. The second time the assumption proposition carried and the waiver proposition was defeated, on a three-district basis. The third time no waiver proposition was submitted, the debt assumption proposition was entitled on the ballot as a "Debt Equalization" proposition, and carried by a narrow margin, the votes of all three districts again being counted together. The defendants announced that the debt assumption had been accomplished.

Knack and Wertz as East China electors and taxpayers, and The Detroit Edison Company as an East China taxpayer, contended that the proceedings were void on both federal and state grounds. The federal grounds were that the disparity in the voting rights accorded to the voters of the annexing and annexed districts, and the requirement that thereafter the debtors and the debt-free should vote in common on the transfer of the indebtedness, worked an unconstitutional denial of equal protection. The state grounds were that no tax limitation waiver had been voted and that in East China no debt assumption had been voted in the manner required by Section 444 of the state statute.

The plaintiffs filed suit in the District Court for declaratory relief on all these grounds. On motion before answer the District Court dismissed the petition. On appeal by all the plaintiffs the Court of Appeals for the Sixth Circuit affirmed, at least as to the result.

## (f-g) BASIS FOR FEDERAL JURISDICTION

Subparagraph (f) of the Rule 23.1 is not applicable since the judgment sought to be reviewed is that of a federal court.

The basis for federal jurisdiction in the District Court: For petitioners Knack and Wertz 28 U.S.C. 1343(3), the suit being to redress the deprivation under color of state law of rights secured by the United States Constitution and by acts of Congress providing for the equal rights of citizens; for petitioner The Detroit Edison Company 28 U.S.C. 1331(a), the suit arising under the United States Constitution and the amount in controversy exceeding $10,000.

## (h) ARGUMENT

The questions which this case presents relate to supposed discriminatory treatment of citizens in the distribution of voting rights, not for the election of representatives but in special elections for the adoption of legislative propositions; and not in national or state-wide elections but in local municipal (school district) elections. The problem therefore differs somewhat from any which this court has so far passed upon, but it is belived to be in the stream of constitutional issues in which this court has recently taken much interest.

The plaintiffs Knack and Wertz are citizens who complain that under color of state law they have been denied equal protection in that their voting rights have been diluted to the point of being worthless. The plaintiff The Detroit Edison Company is a corporation which complains that under color of an unconstitutional statute (unconstitutional because it denies equal protection to the individual plaintiffs and other citizens similarly situated) it is to be subjected to an enormous tax liability.

The lower courts have told the individual plaintiffs that they need more financial involvement before they can complain to the United States courts. The lower courts have told the corporation plaintiff that the abstention doctrine makes present consideration of its grievances unwise.

We summarize the specific questions in this case as follows: (1) Whether there is a denial of equal protection by making the adoption of a certain proposition contingent upon the approval of the electorate when part of the electorate is to speak by direct popular suffrage and part is to speak indirectly through a school board elected a long time before; (2) whether there is a denial of equal protection by making the transfer of indebtedness from one area to another contingent upon an election held in a voting district created *ad hoc* and combining the debtors (very numerous) with the debt-free (very few); (3) whether the Federal courts are closed to discriminated-against voters because their individual involvement does not amount to $10,000; and (4) whether this ought to be an abstention case.

### 1. Disparity in Voting Rights

For purposes of this argument we shall assume that *Attorney-General ex rel Kies v. Lowrey,* 199 U.S. 233, is still as good law as it was in 1905 and that the Michigan legislature by special act and at its whim and caprice could have amalgamated these three school districts into one, without thereby raising anything more than a non-justiciable political question. However that is not what has now happened. Rather the legislature referred the issue to a referendum in the three districts with the electors in two districts voting by direct popular suffrage and the electors of the third district voting indirectly through the votes of five members of their school board whom they had elected to office before this particular issue arose. The appellants contend that this has created an equal protection problem; the courts below think that it remains non-justiciable.

Last year this court said *(Harper v. Virginia State Board of Elections,* 383 U.S. 663 at 666):

> "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the equal protection clause of the Fourteenth Amendment."

The disparity in voting rights is prejudicial, as can be seen at once. The United States citizens who were electors of two districts were allowed to express their individual views by voting "Yes" or "No", the majority to prevail. The United States citizens who were electors of the third district could not express their individual views at all, except as they might present them by petition which the board members were free to and did disregard. The members of the school board voted for them and these board members were not representative. They had been elected for staggered terms one, two, or three years before and they had been chosen on the basis of their political affiliation or of their stand on whatever local issues had been then under discussion. No question of district annexation or transfer of bond liability had arisen, so the board members were not true spokesmen for their constituents on these issues. Had there been no popular election afforded any group, or had all groups been required to speak indirectly through their board members, at least all would have been equally disadvantaged. As it is, however, some citizens are allowed to vote for what they want, while some are put under guardianship with others selected to vote for them.

In *Brouwer v. Kent County Clerk,* 377 Mich. 616, 141 NW2d 98, the Supreme Court of Michigan was equally divided in a case involving rural and urban representation on a county board of supervisors, where the state constitution required that township representatives be elected by

popular vote and that city representatives be chosen in such manner as the legislature might provide. Of this arrangement the opinion concurred in by four of the court's eight justices says:

> "Were we to construe those constitutional provisions to authorize the legislature to provide for a method of selection of such representatives by city residents other than by election, we conclude that we would have to declare them void for violation of the Federal equality clause."

In the present litigation the opinions below lean heavily on *Hunter v. Pittsburgh,* 207 U.S. 161, where the legislature had made the union of a large and small city contingent upon a majority vote of the electors of the two cities collectively. Both groups were treated alike as to voting rights. This court held in 1907 that the change of municipal boundaries was political and non-justiciable. If the *Hunter* decision ever meant that the legislature could discriminate in the voting rights accorded citizens under guise of municipal reorganization, it was in that aspect expressly overruled by *Gomillion v. Lightfoot,* 364 U.S. 339 in 1960.

Two other cases in this court have somewhat approached the present problem. One is *Fortson v. Dorsey,* 379 U.S. 433, decided in 1965. The fact situation there was that members of the Georgia state senate were elected from districts laid out according to county lines, with each district electing one, two, three or more senators according to population. It was claimed that there was an unconstitutional discrimination between electors of different districts in this respect: that in a one-senator district the friends of a particular candidate had only to vote for him and if they were numerous enough they would elect him; whereas in a three-senator district the three highest candidates would be elected, so that the fate of a particular candidate would be affected by the popularity of several other candidates. This

court held (though by a divided vote) that any such disparity in the voting rights was inconsequential. Since all citizens were at least allowed the right of direct sufferage, we do not think the case is authority against us. Had the Georgia statute provided for direct popular elections in some districts with the senators from other districts being chosen by an electoral college of county officers, the case would have been more like our case, and we think the result might well have been different.

The other opinion of this court which reaches the outskirts of the present case is *Sailors v. Kent County Board of Education,* —— U.S. ——, 18 L. Ed. 2d 650, (decided May 22, 1967), which approved the selection of a county board of education by a congress of delegates, one delegate appointed by each local school board and each such board in turn elected by the voters in districts of varying populations. This court said (—— U.S. ——, 18 L. Ed. 2d 654):

> "If we assume arguendo that where a State provides for an election of a local official or agency, the requirements of *Gray v. Sanders* and *Reynolds v. Sims* must me met, we are still short of an answer to the present problem and that is whether Michigan may allow its county school boards to be appointed."

and went on to hold that the state could provide for appointment rather than election of the county board and was in effect so doing, so that equal protection voting right cases were not in point. See also *Dusch v. Davis,* —— U.S. ——, 18 L. Ed. 2d 656, decided the same day. Our present case, we think tenders to this court a variation of the question that was "assumed *arguendo*" in the *Sailors* opinion. The state provides an election, not to choose an official but to adopt or reject special propositions; and the requirements of *Gray v. Sanders* and *Reynolds v. Sims* are not met. Our contention is that they should be.

The present problem can be dramatized by the following illustrations:

> (a) The legislature adopts a proposition subject to its being approved by the people in a special election at which only white protestant gentiles are allowed to vote; or
>
> (b) The legislature authorizes the levy of a tax on all lands in X County, subject to the approval of such electors as reside on farms, excluding those who reside in towns and villages.

The trend of this court's decisions strongly suggests that a denial of equal protection would be found in both illustrations.

What has actually occurred in Michigan, while not so dramatic, is a constitutional error of the same type. By the applicable statute the merger of the three districts is referred to the electors thereof, those of the annexed districts (Marine City and St. Clair) to speak by direct popular suffrage while those of the annexing (East China) district must speak indirectly through their previously-elected school board. The electors of all three districts are United States citizens and they are not treated alike. Some are granted direct and effective suffrage while others are reduced to second-class citizens with indirect and *ex post facto* suffrage.

### 2. Dilution of Voting Rights

The supposed amalgamation of the three districts was followed up by a special election to determine whether the bonded debt of two districts should be made a lien on the lands of all three districts. The particular state of facts was that in two districts there were 8338 electors whose lands were burdened with an indebtedness of $3,268,597, while in the third district there were 900 electors whose lands were debt-free. Also the particular state of facts, considering

the property assessments, was such that the effect of the proposal would be to relieve the original debtors of about $1,800,000 and transfer that amount to the third district.

Defendant officials construed the state law as permitting the votes in the three districts to be counted together, with the obvious result: The votes of the 900 citizens who stood to lose were submerged by the votes of the 8338 citizens who stood to gain. This is what in *Gomillion v. Lightfoot* this court called:

> "not an ordinary geographic redistricting even within familiar abuses of gerrymandering . . . sophisticated as well as simple-minded modes of discrimination." (364 U.S. 341-342).

As this court recognized in *Reynolds v. Sims,* 377 U.S. 533 at 555:

> "and the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Supposedly the legislature has combined St. Clair and Marine City into a special voting district so that they can impose their debts (created by themselves alone) on East China property. Because everybody votes there is a merely superficial appearance of democracy. Superficial appearances have been used to mask the fact that a special voting district has been created so that a particular election result can be produced. This is not the right of free election; rather it is the reverse. This is the subterfuge denounced in *Gray v. Sanders,* 372 U.S. 368—everybody votes, but the votes are so counted that one group is certain to win. The futility of the voting on the special proposition by the voters in the East China district is clearly indicated by the repeated holding of elections until the desired result was obtained.

The legislature has authorized a municipal debt transfer subject to approval at a popular election by the citizens affected. Thereby, as we contend, it became the constitutional duty of the legislature to provide an election free of any arrangement calculated to make any citizen's vote worthless. Instead of so doing the legislature (as the officials construe the statute) gerrymandered the election district so that those who might wish to vote "No" would be overwhelmed by those whose pecuniary interest would require them to vote "Yes". This is another *Carrington v. Rash*, 380 U.S. 89, with the voting lines drawn so that the victory will go to those favoring what the legislature thinks is civic progress. By long history those school districts had been separate election units and the debt had been incurred by the districts voting separately. For this particular occasion the legislature is said to have combined the debt-free with the debtors and has permitted the voters of St. Clair and Marine City to make the determination that there should be encumbrances imposed upon East China property. This, we submit, has denied equal protection to East China voters and property owners.

To these contentions the District Court said:

> "The (recent) cases have nothing to do with limited purpose districts, such as school districts. Nowhere has it been suggested that the constitution applies to voting measures in such districts . . . The reapportionment cases did not alter the rule that burdens created by municipal debt assumption are non-justiciable . . ." (247 F. Supp. 296 at 301, 302; Appendix A, pages 28, 31.)

And the Court of Appeals said:

> "With respect to the constitutional issues concerning the debt assumption proceedings . . . the District Court's determination based on application of the abstention doctrine will be affirmed, although that court's conclusions on both these issues on the merits is also deemed correct." (Appendix B, page 49.)

Later in this memorandum we discuss the abstention question; in the present connection we seek certiorari so that we may be heard on the question of whether equal protection does in fact have application to the voting upon special propositions at an election in a limited-purpose municipality.

### 3. Knack, Wertz and The Detroit Edison Company are all proper party plaintiffs

If the state law denies constitutional equal protection to the individual electors of East China, then the plaintiffs Knack and Wertz have had their civil rights invaded and they are proper suitors to the United States courts without regard to whether there has also been violation of some act of Congress. 28 U.S.C. 1343(3) specifically gives the Federal court jurisdiction of suits

> "to redress the deprivation under color of state law . . . of any right, privilege or immunity secured by the Constitution of the United States *or* by any Act of Congress providing for equal rights . . ." (Italics added.)

The following are examples of equal protection cases successfully maintained by individuals without regard to any act of Congress:

*Baker v. Carr,* 369 U.S. 186;

*La. State University v. Wilson,* 340 U.S. 909.

As this court said in *Gray v. Sanders,* 372 U.S. 368 at 375:

> "any person whose right to vote is impaired (citations) has standing to sue."

Also there is jurisdiction for the individual plaintiffs if the amended complaint charges violations of the Civil Rights acts:

28 U.S.C. 1343(3);

42 U.S.C. 1983 and 1988.

and the complaint here does so charge. Specifically the facts charged come within 42 U.S.C. 1983, 1985(3) and 1988. The Court of Appeals' footnote to its opinion (Appendix B, page 45, below) seems to raise doubt as to whether these sections apply to anything except suits for money damages. The following are cases where the sections were held to give jurisdiction for other forms of relief:

*Baldwin v. Morgan,* (CA 5) 251 F. 2d 780;

*Brewer v. Hoxie School Dist. No. 46,* (CA 8) 238 F. 2d 91.

If the suit is based on deprivation of constitutional rights and privileges or on violation of Civil Rights Acts, or both, the Federal courts have jurisdiction without regard to the amount involved:

*Douglas v. Jeannette,* 319 U.S. 157.

As to the plaintiff corporation, it does not have any right to vote at stake but it will suffer a loss of nearly $2,000,000 if this transfer of bonded indebtedness is upheld. If the debt transfer proceedings are unconstitutional as to Knack and Wertz, they are unconstitutional as to the whole world. Any party having the jurisdictional amount involved can invoke the court's jurisdiction under U.S.C. 1331(a):

*Grosjean v. American Press Co.,* 297 U.S. 233;

*Pierce v. Society of Sisters of the Holy Name,* 268 U.S. 510;

*Mountain Timber Co. v. Washington,* 243 U.S. 219 at 224;

*Savage v. Jones,* 225 U.S. 501;

*Provident Institute for Savings v. Malone,* 221 U.S. 660.

### 4. This is not a Case for Abstention

Of the abstention doctrine this court has said (*County of Alleghany v. Frank Mashuda Co.*, 360 U.S. 185 at 188):

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

Query what "important countervailing interest" justifies the abdication of judicial duty in this litigation? The Sixth Circuit opinion proposes two reasons. The first of these is:

> "The issues raised by the debt assumption proceeding would, if decided in favor of the plaintiffs, result directly or indirectly in avoidance of the state tax which was levied as a result of said debt assumption" (Appendix B, page 50 below.)

This is correct but it does not mean that there would be any disruption of the state's general finances. The effect will not be felt outside of three school districts containing about .002 of the state's population. The validity of the outstanding bonds will not be affected, since the original districts on whose credit they were issued and sold will remain liable for them. The constitutional question to which the Federal courts and particularly this court can give the only final answer will, if necessary, be raised by litigation in other courts and will perhaps come to this court by another route; and meantime the school districts' affairs will continue in a condition of uncertainty.

The following is the second reason given by the Sixth Circuit for its abstention:

> "Indeed abstention is particularly appropriate in this case since the assumption proceeding allegedly failed to conform to state law and since certain sections of the school code pursuant to which the proceedings were conducted allegedly contravened the state constitution. The federal constitutional claims may well be avoided altogether should resolution of the local law issues be dispositive of the case." (Appendix B, page 50 below.)

This likewise is correct, to this extent: The plaintiffs believe that the debt assumption proceedings violate both the Federal and the state law and they have joined all their grounds of complaint in one action pursuant to Rule 18. Thereby the District Court acquired jurisdiction to decide both the Federal and local questions, and to decide the local questions even though it found no violation of Federal law:

*Bell v. Hood,* 327 U.S. 678;

*Hillsborough Township v. Cromwell,* 326 U.S. 620 at 629;

*Hurn v. Oursler,* 289 U.S. 238;

*Sterling v. Constantin,* 287 U.S. 378;

*Siler v. Louisville & Nashville Railroad Co.,* 213 U.S. 175.

So far neither of the lower courts have looked at the local law questions.

The cases are legion in which Federal courts have not hesitated to decide questions of state law, but it is true that in some instances this has been a reason assigned for abstention. In nearly all such instances, however, either the suitors had not been long delayed in the Federal courts, or there was a suit already pending in the state courts in which the local questions were expected to have an early decision. Neither of these situations exists here. This case has been pending four years; and there is no suit pending in the state courts.

Whether these plaintiffs can obtain adequate relief in the state courts is subject to some doubt. Both the District Court (247 F. Supp. 296 at 306; Appendix A, page 39 below) and the Court of Appeals (Appendix B, page 50 below) say that there is an adequate state remedy, relying on a statute which is certainly applicable when the administrative assessment of property valuations is in question. There are Michigan decisions which make it uncertain if the statute is available when the legality and effect of an election is in question:

> *Holland City Clerk v. Ottawa Circuit Judge,* 368 Mich. 479; 118 NW2d 250;
>
> *Grand Rapids City Clerk v. Judge of Superior Court;* 366 Mich. 335, 115 NW2d 112;
>
> *Schurman v. City of Holland,* 355 Mich. 406, 94 NW2d 808.

On the present case, consequently, we must urge that abstention will certainly have the effect of delaying justice and may have the effect of denying it. There is no public policy reason why the case should not be decided on all issues.

## (i) and (j) DOCUMENTS APPENDED

Copies of the opinions and judgments sought to be reviewed are appended hereto, also the text of pertinent sections of the state statute. Also we intend to file herewith nine copies of the record as printed for the use of the court below.

Dated August 15, 1967.

Respectfully submitted,

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## APPENDIX A

The DETROIT EDISON COMPANY,
Ralph Wertz and Herbert Knack,
Plaintiffs,
v.
EAST CHINA TOWNSHIP SCHOOL DISTRICT No. 3, Donald MacDonald, Leland Sass, Mary Phillips, Milton J. Gearing, Edwin H. Lindow, Malcolm G. Simons, and William Hopson, individually and as members of the board of education of said school district, Defendants.
Civ. A. No. 25702.
United States District Court E. D. Michigan, S. D.
Nov. 5, 1965.
(247 F. Supp. 296)

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LEVIN, Chief Judge.

Plaintiffs' suit is for a declaration under 28 U.S.C. §2201 that the annexation of two school districts to the district in which their property is situated is in violation of the federal constitution. They seek a further declaration that the assumption of the large bonded indebtedness of the annexed school districts by the combined larger district is in violation of both federal constitution and state law.

The court now has before it a motion for summary judgment by defendants on the ground that the federal court has no jurisdiction over the subject matter of the controversy as to any of the plaintiffs or, in the alternative, for judgment as a matter of law on the merits.

Plaintiffs now and for many years have owned land in the East China Township School District No. 3, the "original East China district," located in St. Clair County, Michigan. The district is relatively small in population and area, practically debt free, but has a high assessed valuation because plaintiff Detroit Edison's plant in that district is valued at over 82 million dollars. Adjacent to the district was the Marine City Community School District No. 7, "Marine City district," and the School District of the City of St. Clair, "St. Clair district." The two last named districts had a much larger area and population than the original East China district, a much lower assessed valuation, and were obligated to a large bonded indebtedness incumbent through the financing of new high schools. The original East China district paid tuition for its high school students who attended these schools.

Early in 1961, the original East China district annexed the Marine City and St. Clair districts, making the "combined district." Since the annexations, the combined district has operated as an integrated unit, and operating expenses have been assessed uniformly on all property. Propositions that the combined district assume the bonded debt of the former Marine City and St. Clair districts were rejected on several occasions. In June 1964, however, the electors of the combined district voted to assume the high school bonded indebtedness totalling approximately 2.8 million dollars. The result of the assumption was to shift about sixty percent of this liability to the electors of the original East China district, a considerable portion of which became the burden of the plaintiff taxpayer Detroit Edison.

The annexation proceedings were conducted pursuant to the Michigan School Code.[1] This statute provides for annexation by the approval of the following: (1) the State Superintendent of Public Instruction; (2) a majority vote of the board of education of the annexing district (the original East China district and (3) a majority vote of the qualified electors of each of the annexed districts (the Marine City and St. Clair districts). The statute does not provited for an election by the electors of the annexing district.[2] In Detroit Edison Company v. East China Tp. School District, 366 Mich. 638, 115 N.W. 2d 298 (1962), the Michigan Supreme Court held that these annexation proceedings were in accordance with the state law, but it was not presented with, nor considered, the issues in this case—whether the debt assumption conformed to state law and whether the annexation or debt assumption is constitutional.

The annexation is alleged to violate the due process and equal protection of the law provisions of the Fourteenth Amendment because the annexed districts approved it by a direct vote of the electors while the annexing district approved it by a vote of the board of education—an indirect or representative approval of the electors. The debt assumption after the annexation is also said to violate the equal protection and due process provisions of the Fourteenth Amendment because the votes of the numerous electors of the Marine City and St. Clair districts were not separated in the count from the votes of the original East China district and submerged the views of the voters of East China, whose interests were adverse. This, say the plaintiffs, is a destruction and debasement of voting rights.

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[1] C.L.S. 1961 §340.1 et seq. (Michigan Statutes Annotated §15.3001 et seq.).

[2] C.L.S. 1961 §340.431 et seq. (Mich. Stat. Ann. §15.3431 et seq.).

Plaintiffs contend further that assuming the procedures are constitutionally unassailable, the burden created by the debt assumption is so disproportionate to the benefits that it violates the due process provision of the Fourteenth Amendment.

The parties have discussed in their briefs and oral arguments three aspects of federal jurisdiction: first, whether plaintiffs present a "federal question" and satisfy the jurisdictional amount requirement under 28 U.S.C. §1331 (a), the so-called Federal Question jurisdiction; second, whether the subject matter is within 28 U.S.C. §1343, the so-called Civil Rights jurisdiction; and third, whether the abstention doctrine applies.

[1] Any alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution. Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907). There, the City of Pittsburgh was about to incur a large indebtedness. The City of Allegheny was annexed to Pittsburgh pursuant to a state statute requiring the approval of a majority of all voters, although a majority of the Allegheny voters opposed it. The Supreme Court upheld the annexation and affirmed the general principle as follows:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. • • • The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. • • • The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in

> other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the constitution of the United States. 207 U.S. 161, 178-179, 28 S.Ct. 40, 46.

Recently, the Supreme Court had an occasion to limit this broad language to the specific provisions considered in Hunter—the impairment of contracts and due process. In Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), the Court held that a complaint stated a cause of action when it alleged alterations in the boundaries of Tuskegee, Alabama, disenfranchised Negroes in violation of the Fifteenth Amendment. The Hunter rule is not an absolute, the Court said, and must yield to the specific limitation of the Fifteenth Amendment.

Gomillion does not diminish the authority of Hunter in annexation *procedure* cases. The Court specifically characterized the problem as the municipal disenfranchisement of Negroes. In fact, the Court rejected the plaintiff's contention based on the equal protection provision. Both the Fifth and Tenth Circuits have subsequently held that Hunter forecloses a challenge to an annexation procedure based on the equal protection provision. Hammonds v. City of Corpus Christi, Texas, 343 F.2d 162 (5th Cir. 1965), cert. den., 86 S.Ct. 85 (Oct. 11, 1965), affirming 226 F.Supp. 456 (S.D. Tex. 1964); International Harvester Company v. Kansas City, 308 F.2d 35 (10th Cir. 1962).

State courts have reached a similar conclusion. In School Dist. of City of Lansing v. State Board of Education, 367 Mich. 591, 116 N.W.2d 866 (1962), the Michigan Supreme Court rejected an argument almost identical to that of the plaintiffs here in connection with another provision of the Michigan School Code.

Plaintiffs' main argument is that Hunter v. City of Pittsburgh "is no longer law insofar as it is inconsistent in theory with [the reapportionment cases]." They claim Hunter is the product of an era in which "the constitution was so construed as to exclude from the courts' consideration so-called political questions of electoral district and tax district boundaries." Since Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962), a dilution in voting rights is justiciable under the equal protection clause. Plaintiffs would have the principles established in the reapportionment cases apply to the original East China district annexations.

Much uncertainty surounds the effect of the reapportionment decisions on local government. A threshold question is whether the equal protection clause applies to *any* municipal problems, even reapportionment of representative legislative bodies.

The Supreme Court has not specifically extended the application of the equal protection clause beyond the composition of state legislatures and justiciability may well be limited to the state. Some lower courts have held that the equal protection clause does not extend to local units of government, e. g., Johnson v. Genesee County, Michigan, 232 F.Supp. 567 (E.D.Mich.1964), others, that it does apply, e. g., Brouwer v. Bronkema, No. 1855, Cir.Ct. Kent County, Michigan, September 11, 1964 (appeal pending) and still others have assumed it extends without fully discussing this issue, e. g., Ellis v. Mayor and City Council

of Baltimore, 234 F.Supp. 945 (E.D.Md.1964, aff'd 352 F.2d 123 (4th Cir. Oct. 11, 1965). One commentator concluded that the equal protection clause probably applies to local general purpose governments but not special purpose local governmental agencies. Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Colum.L.Rev. 21 (1965).

The Supreme Court may have resolved the issue in favor of limiting the equal protection clause. Griffing v. Bianchi, 86 S.Ct. 52 (Oct. 11, 1965). A three-judge district court had found the Suffolk County Board of Supervisors completely malapportioned. Although the court declined to act until the political agencies had an opportunity to create an appropriate governing body, it refused to dismiss the complaint because it concluded that the equal protection tests applied to the controversy. The Supreme Court disposed of the appeal with these words: "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction." Perhaps the dispute is not over, but it would seem that the Supreme Court does not, at this time, see fit to extend the courts' involvement in this area.

[2] It is unnecessary for the court to attempt to resolve the fundamental issue, and it is sufficient to note the present uncertainty; for even if the equal protection clause applies to local government reapportionment problems, it does not follow that annexation procedures raise a justiciable issue.

[3] The right at stake in the reapportionment cases is that, in state representative government, the weight of the vote of a citizen in one electoral district be approximately equal to the weight of another citizen's vote in any other electoral district. A state may not create electoral

districts which have a population disparity. But this is the only limitation the cases place upon the legislative power of a state to define political boundaries. They create no constitutional rights in affected citizens concerning the *procedure* for creating or altering these districts. Even where the Court has held electoral district boundaries must be altered, it has failed to establish a specific *procedure* to accomplish this. Reynolds v. Sims, 377 U.S. 533, 585, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Further, the cases have nothing to do with limited purpose districts, such as school districts. Nowhere has it been suggested that the constitution applies to voting matters in such districts.

The court, having observed that a right to vote or to an equal vote in annexations has never been recognized, notes a comment by Mr. Justice Stewart on the reapportionment cases:

> It is important to make clear at the outset what these cases are not about. They have nothing to do with the denial or impairment of any person's right to vote. Nobody's right to vote has been denied. Nobody's right to vote has been restricted. Nobody has been deprived of the right to have his vote counted
> • • •
>
> The question involved in these cases is quite a different one. Simply stated, the question is to what degree, if at all, the Equal Protection Clause of the Fourteenth Amendment limits each sovereign State's freedom to establish appropriate electoral constituencies from which representatives to the State's bicameral legislative assembly are to be chosen. [Lucas v. Forty-Fourth Gen. Assembly of State of Colorado, 377 U.S. 713, 744, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964).]

Far from implying a change in the Hunter doctrine, the reapportionment cases seem to reaffirm it. In Reynolds v. Sims, supra, the leading case in which the Supreme Court held that both houses of a bicameral legislature must be apportioned on a population basis, Chief Justice Warren quoted from Hunter with apparent approval:

> Political subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178 [28 S. Ct. 40, 52 L.Ed. 151], these governmental units are "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them," and the "number, nature, and duration of the powers conferred upon [them] • • • and the territory over which they shall be exercised rests in the absolute discretion of the state". 377 U.S. 533, 575, 84 S.Ct. 1362, 1388.

Carrington v. Rash, 380 U.S 89, 85 S. Ct. 775, 13 L.Ed. 2d 675 (1965), cited by plaintiffs, is inapposite. That case involved the absolute denial of the franchise in all state elections which is distinct from the issues here.

Any lingering doubts about the vitality of Hunter in the wake of the reapportionment cases should have been dispelled when the Supreme Court denied certiorari in Hammonds v. City of Corpus Christi, Texas, supra. That case is similar to this one. There it was the annexed district which complained of a deprivation of voting rights under the equal protection clause. The plaintiffs were in an even stronger position than the electors of the original

East China district for two reasons. They were not even permitted to express their will indirectly through an elected representative body, and the annexation involved a city and not a limited purpose district. The lower courts dismissed the complaint, relying on Hunter. While the denial of certiorari is, of course, not necessarily an agreement with the opinion below, this denial is significant in light of the Supreme Court's actions in voting cases.

[4] The foundation on which the Hunter doctrine has stood for half a century on the issue of annexation procedure is as sturdy as ever. This court holds, therefore, that the school district annexation procedure of the Michigan School Code, which was followed by the original East China district in forming the combined district, is a purely legislative matter. It is not justiciable under the due process or the equal protection clauses of the Fourteenth Amendment to the federal constitution.

[5] On the assumption of indebtedness issue, plaintiffs fare no better than on the annexation question, and for the same reasons. Included within the state's power to alter boundaries is the power to increase or decrease the area burdened with existing debt. Laramie County Com'rs v. Albany County Com'rs, 92 U.S. 307, 23 L.Ed. 552 (1875); Attorney General of State of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 26 S.Ct. 27, 50 L.Ed. 167 (1905).

The Supreme Court fully considered the state's power to alter municipal debt structure in Laramie County. In that case, the legislature established a new county which included two-thirds of the property of Laramie County. The remaining one-third paid the prior debt of the entire county, and the court held that it was not entitled to contribution from the property which had been removed to form the new county. The Court said "the legislature

possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable." 92 U.S. 307, 312. During the course of its opinion, the Court may have (in 1875) anticipated the essential problem of the instant suit:

> Cases doubtless arise where injustice is done by annexing part of one municipal corporation to another, or by the division of such a corporation and the creation of a new one, or by the consolidation of two or more such corporations into one of larger size. Examples illustrative of these suggestions may easily be imagined. (1) Consolidation will work injustice where one of the corporations is largely in debt and the other owes nothing, as the residents in the non-indebted municipality must necessarily submit to increased burdens in consequence of the indebtedness of their associates. 92 U.S. 307, 314.

The Court agreed that boundary changes and shifting debt burdens "often present matters for adjustment involving questions of great delicacy and difficulty." However, it concluded that the resolution of these questions is legislative or political and not constitutional.

See also Attorney General of State of Michigan ex rel. Kies v. Lowrey, supra, where a new school district was required to pay the total debts of its larger, predecessor district.

[6] The language and underlying theory of these cases foreclose an equal protection clause challenge to debt assumption, even though this provision was not specifically urged there. The reapportionment cases did not alter the rule that burdens created by municipal debt assumption

are non-justiciable for the reasons stated previously in regard to the annexations of the Marine City district and St. Clair district. The assumption of indebtedness is not in violation of federal constitutional guarantees.

Moreover, even if by some stretch of reasoning the equal protection clause applies to the debt assumption, plaintiffs' argument falls. Plaintiffs contend that the former debtor districts (St. Clair and Marine City) and the former debt-free district (original East China) should be required to vote separately on the debt assumption. The reapportionment cases prohibit state-created boundaries from interfering with the equality of each man's vote. A fortiori, the "one-man, one-vote" command applies to direct suffrage such as in the debt assumption. The proposed grouping is no more legitimate than the rejected rural-urban groupings.

Assuming the constitutionality of the voting procedures, plaintiffs allege the benefits conferred by the debt assumption are so grossly disproportionate to the burdens as to amount to a taking of property without due process of law.

[7-12] The power of the courts over state taxation is limited. The constitution does not require that benefits be exactly proportional to burdens, nor that every taxpayer actually receive a direct benefit. "[T]here are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination." Union Refrigerator Transit Company v. Com. of Kentucky, 199 U.S. 194, 203, 26 S.Ct. 36, 37, 50 L.Ed. 150 (1905). "[A] state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the

burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing.'" Dane v. Jackson, 256 U.S. 589, 599, 41 S.Ct. 566, 568, 65 L.Ed. 1107 (1921). The test for a tax is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." State of Wisconsin v. J. C. Penney Company, 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940).

Property taxes which have been held to violate the due process clause generally fall into two categories. The first includes assessments for purposes that will improve the value of particular property and from which certain geographical areas could derive no benefit but would assume a heavy tax burden. One example is a drainage district assessment. Myles Salt Company v. Board of Com'rs of Iberia & St. Mary Drainage District, 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392 (1916); Thomas v. Kansas City So. Ry. Co., 261 U.S. 481, 43 S.Ct. 440, 67 L.Ed. 758 (1923). The second category includes non-uniform taxation which is arbitrary under the circumstances. Nashville, C & St. L. Ry. v. Walters, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 (1935).

[13] Whatever may be the rule with regard to assessments for other purposes, it has never been held that a school tax levied uniformly on all property within the school district fails to provide benefits or can be an arbitrary exercise of the taxing power, regardless of the amount assessed to any single property owner. For "every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he

have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit." Union Refrigerator Transit Co. v. Com. of Kentucky, supra.

[14] If Detroit Edison were allowed to show that its school tax burden greatly exceeded its benefits, then every large property owner would have the same right in regard to these basic assessments for the general welfare. School taxes might ultimately become similar to user taxes. Due process does not require this.

[15, 16] The remedy suggested by Detroit Edison would serve only to aggravate a due process violation if one existed. The sole burden which the court considers in testing a tax under due process is the percentage for which the taxpayer is liable. The absolute amount of the tax is irrelevant, as is the fact that the debt was incurred prior to the taxpayer's liability if the full benefits are still available. If this court were to nullify the annexation and assumption, Detroit Edison would be located in a smaller district and become liable for a substantially larger percentage of that school district's assessments.

Plaintiffs rely on Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897, (10th Cir. 1947). The complaint alleged that a taxpayer would be required to pay 46 per cent of the costs for a water works district which, "when constructed, will neither presently nor in the future, furnish water or any other benefit to plaintiff's property or the nearby dwellings." The court held that assuming indirect benefits existed, the burden may nevertheless be so grossly disproportionate to the benefits that it would violate due process, and the court granted a preliminary injunction pending a trial on the merits. That case is analogous to the

drainage line of cases. It cannot be read as implying that a court may weigh the benefits to a taxpayer from school district assessments. In fact, it cites with approval the rule previously quoted from the Union Refrigerator case.

[17] Since the acts of which the plaintiffs complain are not violative of the federal constitution, the court holds that it has no jurisdiction. The following issues may merit a short discussion.

For federal question jurisdiction to attach, the "matter in controversy" must exceed $10,000 exclusive of interest and costs. 28 U.S.C. §1331(a). The issue is whether the "matter in controversy" in this suit is the value of the property which may be encumbered by the tax or the amount of the tax itself. If the latter is the appropriate measure, the individual plaintiffs fail to allege the requisite amount.

[18] In an action involving a tax or assessment, the "matter in controversy" is the tax for which the plaintiff is liable. Healy v. Ratta, 292 U.S. 263, 268, 54 S.Ct. 700, 78 L.Ed. 1248 (1934). The plaintiff in that case sued to have a state license fee of $50 on certain businesses declared unconstitutional. The Supreme Court held that the actual tax, not the value of the business affected by the license fee, was the test based on the settled principle governing *property* taxes which is stated as follows:

> It has never been thought that the federal courts have jurisdiction of suits to restrain the collection of a property tax or other money exaction of less than the jurisdictional amount assailed as unconstitutional merely because the penalty for non-payment, which has not been incurred, exceeds that amount. [citation] The tax, payment of which is demanded or resisted, is the matter in controversy, since payment of it would avoid the penalty and end the dispute.

Plaintiffs argue the value of the property determines the jurisdictional amount "where the action is not to enjoin the collection of a sum claimed to be due as a tax but rather to contest the validity of the proceedings giving rise to the encumbrance of property as the result of tax liens." However, Risty v. Chicago, Rock Island & Pacific R. Company, et al., 270 U.S. 378, 46 S.Ct. 236, 70 L.Ed. 641 (1926), on which plaintiffs rely, does not support this contention. The plaintiffs in that case were attacking proceedings which placed their lands in a drainage district thereby subjecting them to assessments for certain improvements. The Court specifically found that the assessments themselves satisfied the jurisdictional amount. The Court's discussion of "the invalidity of the whole proceeding" was directed only to the issue of whether the particular suit was appropriate for equitable relief and ripe for decision.

[19, 20] The applicable standard for jurisdictional amount under 28 U.S.C. §1331(a) is to be determined under federal law, Horton v. Liberty Mutual Ins. Company, 367 U.S. 348, 352, 81 S.Ct. 1570, 6 L.Ed.2d 890 (1961). Therefore, the rule in Michigan that the value of the property determines jurisdictional amount, Fuller v. City of Grand Rapids, Michigan, 40 Mich. 395 (1879), has no bearing in this case.

[21] Neither plaintiffs Ralph Wertz nor Herbert Knack avers the requisite jurisdictional amount. Their complaints arising under 28 U.S.C. §1331(a) may be dismissed for this additional reason.

Plaintiffs also allege jurisdiction under the so-called Civil Rights jurisdiction of the federal courts, 28 U.S.C. §1343 (3).[3] The statute, in pertinent part, provides for district court jurisdiction to redress the deprivation of constitutional rights by those acting under color of state law.

Civil Rights jurisdiction contains no requirement that any necessary amount be in controversy. Plaintiffs state "at this time the chief importance of the subject is that it supplies a second ground for the court's jurisdiction and obviates any dispute as to jurisdictional amount."

If the issue in this case were a pure voting question, there can be no doubt that reliance on 28 U.S.C. §1343(3) would be proper. Jurisdiction in the reapportionment cases themselves is based on this section, e.g., Baker v. Carr, supra. Similarly, if the issue were a pure tax question, Civil Rights jurisdiction would generally be improper, as in the disproportionate burden theory of plaintiffs' case.

[22] A mixed issue, such as the voting procedure used in the creation of tax liability, is much more difficult to decide. A major purpose of Civil Rights jurisdiction is to redress the deprivation of constitutional rights which have no pecuniary valuation. To entertain jurisdiction under 28 U.S.C. §1343 (3) over essentially property claimed only because the plaintiff alleges a constitutional deprivation, could lead to a widespread circumvention of 28 U.S.C. §1331(a) with its jurisdictional amount limitation. Hague v. C.I.O., 307 U.S. 496, 531-532, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). See also Pierre et al. v. Jordan, 333 F.2d 951 (9th Cir. 1964).

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[3] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

[23] Finally, on the abstention doctrine, the federal courts in their sound discretion abstain from entertaining jurisdiction when interests of public policy would be served thereby and when the state involved provides an adequate and appropriate remedy in law or equity. Great Lakes Dredge & Dock Company et al. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943).

[24, 25] The doctrine is applied, as often as not, depending on the particular public policies involved and the particular state remedy available. For example, the federal courts will generally obstain from holding a state statute unconstitutional until the state courts familiar with the local law have had an opportunity to construe it. Alabama State Federation of Labor, etc. v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). This is necessary for harmonious fed[illegible] relations; but when important Civil Rights qu[illegible] raised and the state law is neither ambiguou[illegible] issue, the federal courts often accept jurisdict[illegible] Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.[illegible]2d 377 (teacher loyalty oath); McNeese v. Board of Education, 373 U.S. 668, 673, 83 S.Ct. 1433, 10 L.Ed.2d 622 (school segregation); Harmon v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (poll tax).

When claims regarding the fiscal operations of states or their subdivisions are presented, federal courts have usually applied the abstention doctrine. The public policy considerations are generally "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts" and specifically the avoidance of "[i]nterference with state internal economy and administration." Great Lakes Dredge & Dock Company et al. v. Huffman, supra, 298, 63 S.Ct. 1073.

This practice of declining jurisdiction in fiscal matters was codified by Congress in the Johnson Act, 28 U.S.C. §1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Although the Act speaks only of suits for coercive relief, the Supreme Court is "of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." Great Lakes Dredge & Dock Company et al. v. Huffman, supra, 299, 63 S.Ct. 1073.

While the plaintiffs urge various constitutional claims, the court cannot close its eyes to the relief sought. This is a tax case. The court has been presented with no consideration of policy and no exceptional circumstances which should make the abstention doctrine inapplicable. In fact, plaintiffs urge a construction of the Michigan School Code, Section 444, which would be a basis for the ultimate relief they seek—relief from the tax burden. C.L.S. 1961 §340.444 (Mich. Stat. Ann. §15.3444).

[26, 27] Before the doctrine can apply, the state imposing the tax burden must provide a "plain, speedy, and efficient" remedy in the state court. The Sixth Circuit has determined that Michigan does provide an adequate remedy to attack improper taxation within the meaning of the abstention doctrine. Helmsley v. City of Detroit, 320 F.2d 476 (1963); Wyandotte Chemical Corp. v. City of Wyandotte, 321 F.2d 927 (1963). Plaintiffs' remedy is not limited to quo warranto. C.L. 1948 §211.53 (Mich. Stat. Ann. §7.97). There-

fore, even if a proper jurisdictional basis existed, this court in the proper exercise of its discretion should decline jurisdiction.

To summarize: the acts of which plaintiffs complain do not abridge any substantive rights secured to them by the federal constitution. The individual plaintiffs' suits do not meet the jurisdictional amount requirement in 28 U.S.C. §1331(a) and are not within the scope of 28 U.S.C. §1343(3); and even if the plaintiffs have a valid constitutional claim, this suit comes with the abstention doctrine.

An order is being entered dismissing the complaint.

## ORDER DISMISSING COMPLAINT

(Filed November 5, 1965)

In accordance with the Opinion filed today in the above-entitled matter, the complaint is hereby dismissed.

/s/ Theodore Levin,
Chief United State District Judge.

Dated: Detroit, Michigan
November 5, 1965.

## APPENDIX B

## OPINION OF THE U. S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17004

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

| | |
|---|---|
| The Detroit Edison Company, Ralph Wertz and Herbert Knack, *Plaintiffs-Appellants,* v. East China Township School District No. 3, Donald MacDonald, Leland Sass, Mary Phillips, Milton J. Gearing, Edwin H. Lindow, Malcolm G. Simons and William Hopson, Individually and as Members of the Board of Education of said School District, *Defendants-Appellees.* | On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division. |

Decided June 2, 1967.

Before: Phillips and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

Peck, Circuit Judge. Plaintiffs-appellants sought a declaration pursuant to 28 U.S.C. §2201 that the annexation of two larger school districts to the school district in which they owned property violated the Fourteenth Amendment of the federal constitution, and that the assumption of the bonded indebtedness of the two annexed school districts by

At all times relevant hereto, plaintiffs owned property within East China Township School District No. 3 (hereinafter "East China"), in St. Clair County, Michigan. Prior to 1960, East China embraced an area of 12 square miles, had 900 electors, a relatively small outstanding bonded indebtedness and a total property assessment for taxation purposes of approximately $82 million, the overwhelming proportion of which could be attributed to the power plant of Detroit Edison Company. Adjacent to East China was Marine City Community School District No. 7 (hereinafter "Marine City"), which embraced an area of 51 square miles, had 3800 electors, a relatively high outstanding bonded indebtedness and a total property assessment for taxation purposes of approximately $19.5 million. Also adjacent to East China was the School District of the City of St. Clair (hereinafter "St. Clair"), which embraced an area of 27 square miles, had 4538 electors, a relatively high outstanding bonded indebtedness and a total property assessment of approximately $18.7 million.

In 1961, East China annexed both Marine City and St. Clair, the combined district thereafter being operated as a single, integrated unit. The annexations were made pursuant to the Michigan School Code (CLS 1961 §340.1 et seq. (Michigan Statutes Annotated §15.3001 et seq.)) which in pertinent part provided for school district annexations upon the approval of the State Superintendent of Public Instruction, the affirmative vote of the school electors in the annexed district and the affirmative vote of the board of education of the annexing district. The Michigan Supreme Court, in *Detroit Edison Co. v. East China School District*, 366 Mich. 638 (1962), upheld the validity of the annexations in question as against plaintiff Detroit Edison's contention that the joinder of the districts should have been accomplished pursuant to the statutory consolidation provisions

which would have required an affirmative vote by the electors in both the annexing and annexed districts. The issues presented in the instant case were not raised in the state proceeding.

Subsequent to the annexations, the electors of the combined district voted to assume the high school bonded indebtedness of the former Marine City and St. Clair districts. The complaint alleges that the electors of original East China rejected the debt assumption proposal although it was approved by a majority of the voters of the combined district. Thus, with respect to the $2.8 million bonded liability, over 60 per cent was allegedly shifted to East China, a large portion of which fell on plaintiff-appellant Detroit Edison Co.

The plaintiffs in this case consist both of individual property owners of the original East China district (who had the statutory right to vote directly on the debt assumption proposals) and Detroit Edison, a New York corporation which obviously and admittedly did not have any voting right.

The complaint alleges that the statute which permitted the annexation and debt assumption proceedings is violative of the due process and equal protection clauses of the Fourteenth Amendment of the federal constitution because the individual plaintiffs were denied the right to vote on the annexation proposal and their voting power was debased and diluted since they were compelled to vote in common with other adversely interested electors on the debt assumption issue. Thus, say plaintiffs, they have been discriminated against and have had their voting franchise abridged as compared with that of electors in adjacent districts. The complaint also alleges that the statute as applied to all East China property owners, including the

corporate plaintiff, violates the above mentioned provisions of the Fourteenth Amendment since their property has been subjected to liens for the payment of the debts of others. Plaintiffs further contend that the tax burden imposed as a result of the debt assumption is so disproportionate to the benefits received as to amount to confiscation. Finally, plaintiffs contend that the debt assumption is invalid because the proceedings did not conform to state law. The specific relief requested was a declaration that the combined district had not assumed the bonded indebtedness of Marine City and St. Clair, that plaintiffs' property within the former East China district cannot be reached for the payment of such indebtedness, and that there has been no lawful annexation.

Upon defendants' motion for summary judgment, based on the grounds that the court had no jurisdiction of the subject matter and that plaintiffs failed to state a claim upon which relief could be granted, the District Court dismissed the complaint, stating that "[T]he acts of which plaintiffs complain do not abridge any substantive rights secured to them by the federal constitution. The individual plaintiffs' suits do not meet the jurisdictional amount requirement in 28 U.S.C. §1331a and are not within the scope of 28 U.S.C. §1343(3); and even if the plaintiffs have a valid constitutional claim, this suit comes within the abstention doctrine."

This action allegedly arising under the Constitution, jurisdiction was based in part upon 28 U.S.C. 1331, federal question jurisdiction. The District Court held that neither of the individual plaintiffs averred the requisite $10,000 jurisdictional amount, since the actual tax or assessment rather than the value of the property affected by the tax (as claimed by plaintiffs) was determinative of this issue. On appeal, dismissal of the complaint on this ground is not challenged.

Jurisdiction was also predicated upon section 1343(3)[1] of Title 28, U.S.C., as the suit was based upon the Civil Rights Acts, 42 U.S.C.A. §1971 et seq.[2] The District Court held that this suit involving "essentially property claims" was not within the scope of section 1343(3) since the major purpose of Civil Rights jurisdiction is to redress the deprivation of constitutional rights which are incapable of pecuniary valuation. While the limitation suggested is derived from Justice Stone's concurring opinion in *Hague* v. *C.I.O.*, 307 U.S. 496 (1939), it is unnecessary for a final disposition of this case that the District Court's ruling on this issue be affirmed, it being merely observed that many courts, including this one, have taken what has been termed a "latitudinarian view." *Joe Louis Milk Co.* v. *Hershey*, 243 F. Supp. 351, 354 (N.D. Ill. 1965). See *Glicker* v. *Michigan Liquor Control Comm.*, 160 F.2d 96 (6th Cir. 1947); *Lewis* v. *City of Grand Rapids*, 356 F.2d 276 (1966), *cert. denied*, 385 U.S. 838 (1966); *Burt* v. *City of New York*, 156 F.2d 791 (2d Cir. 1946); *Cobb* v. *City of Malden*, 202 F.2d 701 (1st Cir. 1953); *McGuire* v. *Sadler*, 337 F.2d 902 (5th Cir. 1964).

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[1] §1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

[2] In the District Court, plaintiffs did not specify the provision or provisions of the various Civil Rights Acts upon which they relied, citing only "sections 1971 to 1995 of Title 42," U.S.C.A. In the briefs filed with this court, plaintiffs cite no cases in support of their position and only the jurisdictional section (§1343(3)) is referred to. Clearly, many of the sections included in the reference to §§1971-95 inclusive of 42 U.S.C.A. are inapplicable in this case. Plaintiffs appear to rely on the allegations charging a conspiracy by defendants for the purpose of denying plaintiffs of the equal protection of the laws. However, section 1985(3), 42 U.S.C.A., which affords a remedy for those injured by such a conspiracy, only provides for the maintenance of an action at law for damages. See *McShane v. Moldovan*, 172 F.2d 1016, 1018 (6th Cir. 1949).

The District Court, relying principally on *Hunter v. Pittsburgh* (207 U.S. 161 (1907)) for the proposition that "any alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution," held that the annexation procedure followed was a legislative matter not justiciable under the due process or equal protection clauses of the Fourteenth Amendment.

In *Hunter,* the City of Allegheny was consolidated with the City of Pittsburgh pursuant to an act of the State General Assembly. Consolidation was permitted by the act upon an affirmative vote of a majority of the voters within both municipal corporations. Although a majority of Allegheny voters opposed the consolidation and voted against it, the proposal passed, whereupon suit was commenced in the state courts. On appeal, the Supreme Court summarized the assignment of error pertinent here as follows (p. 177):

> "Briefly stated, the assertion is that the Act of Assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation. The manner in which the right of due process has been violated . . . is that the method of voting in the consolidation prescribed in the Act has permitted the voters of the larger city to overpower the voters of the smaller city, and compel the union without consent and against their protest."

The following established principles were dispositive of this contention (p. 178-79):

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as

> may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers. . . ."

Two other Circuits, the Fifth and Tenth, have had occasion to pass on cases where the constitutionality of a state annexation procedure was raised. As the District

Court noted, both Courts of Appeals relied on *Hunter* v. *Pittsburgh* in affirming dismissals of their respective cases. In *Hammonds* v. *City of Corpus Christi*, 343 F.2d 162 (5th Cir.), *cert. denied*, 382 U.S. 837 (1965), the court found no error in the District Court's decision which dismissed the complaint on the ground, among others, that "the annexation of lands to a city has been held without exception to be purely a political matter, entirely within the power of the State legislature to regulate." And in *International Harvester Co.* v. *Kansas City*, 308 F.2d 35 (1962), *cert. denied*, 371 U.S. 948 (1963) after quoting from *Hunter*, stated:

> "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. . . ."

With respect to the annexation issue, plaintiffs reliance on the relatively recent apportionment cases is misplaced. The Court in *Reynolds v. Sims*, 377 U.S. 533, 554 (1954), for example, recognized that "all qualified voters have a constitutional protected right to vote" referring of course to the right to vote for a "candidate of one's choice" in a "representative government" system), and thus the Court, relying on the equal protection concept, limited the states' power to disregard population in defining political boundaries for election purposes. However, as the District Court noted, the reapportionment cases "create no constitutional rights in affected citizens concerning the *procedure* for creating or altering" any type of state district. The judgment of the District Court with respect to the annexation issue will hereinafter be affirmed; reference is made to the well reasoned opinion of District Judge Theodore Levin reported at 247 F. Supp. 296, wherein the cases of *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) and *Carrington* v. *Rash*, 380 U.S. 89 (1965) are shown to be inapposite.

With respect to the constitutional issues concerning the debt assumption proceedings (i.e., that the procedures employed pursuant to state statute were violative of the due process and equal protection clauses of the Fourteenth Amendment, and that the tax imposed as a result thereof was so disproportionate to the benefits received as to amount to confiscation), the District Court's determination based on application of the abstention doctrine will be affirmed, although the court's conclusions on both these issues on the merits is also deemed correct.

Federal courts generally abstain from exercising jurisdiction in order to avoid conflict with the administration by a state of its own affairs. See *1 Barron & Holtzoff, Federal Practice and Procedure* § 64 (Wright ed. 1960). This policy is codified by the Johnson Act, 28 U.S.C. 1341, in the area of state taxation:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

In *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293 (1943), plaintiffs sought a declaratory judgment regarding the constitutionality of a state tax. The Court reiterated the principle that "scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts," the guideline being the reluctance to interfere with a state's "fiscal operations" or with "state internal economy and administration." *Id.* at 298. Although the relief sought in that case, was, as here, non-coercive in nature, the Court, after noting the Johnson Act, stated that "those considerations which have led federal courts of equity to refuse to enjoin the collection of

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state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Id.* at 299.

The above principles are applicable here. The issues raised by the debt assumption proceeding would, if decided in favor of plaintiffs, result directly or indirectly in avoidance of the state tax which was levied as a result of said debt assumption. Indeed, abstention is particularly appropriate in this case since the assumption proceeding allegedly failed to conform to state law and since certain sections of the school code pursuant to which the proceedings were conducted allegedly contravened the state constitution. The federal constitutional claims may well be avoided altogether should resolution of the local law issues be dispositive of the case.

A state must, as a prerequisite to application of the abstention doctrine, provide a "plain, speedy and efficient" remedy for the claim asserted. The District Court's conclusion that Michigan does provide such a remedy to attack improper taxation is sound. Compiled Laws (1948) §211.53 (Mich. Stat. Ann. §7.97) permits a party to pay a state tax or assessment under protest, stating the reason therefore in writing, and then bring a suit for recovery within thirty days.

One further matter deserves mention at this point. Where, as here, a District Court determination of a constitutional issue is grounded on alternative holdings, one reaching the merits and the other sustaining abstention, it is susceptible of criticism. Because a District Court need not (indeed should not) reach the merits where abstention is proper, *Great Lakes Dredge & Dock Co.* v. *Huffman, supra* at 301-2, a decision based on such alternative holdings needlessly decides a constitutional issue. Such a decision is in the nature of an advisory opinion, the rendering

of which should in the exercise of judicial restraint be avoided where possible. Confusion may be created by such holdings which may not clearly indicate whether the decision is on the merits or whether the case has been referred to the state court for its decision on the merits. The breadth of the District Court's decision may be subject to scrutiny in the state courts in the form of the defense of res judicata.

The judgment of the District Court with respect to the annexation issue is affirmed because plaintiffs have failed to state a claim upon which relief may be granted; and affirmed with respect to the debt assumption issues under an application of the abstention doctrine.

## JUDGMENT

Before: Phillips and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed with respect to the annexation issue because plaintiffs have failed to state a claim upon which relief may be granted; and affirmed with respect to the debt assumption issues under an application of the abstention doctrine.

**It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.**

**Entered by order of the Court.**

**Carl W. Reuss**

**Clerk**

## APPENDIX C

### Secs. 431, 438 and 444 of Act 269, P. A. 1955

### (C.L. '48 Secs. 340.431, 340.438 and 340.4444; M.S.A. 15.3431, 15.3438 and 15.3444)

Sec. 431. Any school district shall become annexed to another school district whenever the board of the annexing district shall have by resolution so determined and a majority of the qualified school electors of the district becoming annexed, voting on the question at an annual or special election shall have approved such annexation. The vote on the question shall be by printed or duplicated ballot: Provided, That before such election shall be held, the board of the annexing district shall obtain the approval of the superintendent of public instruction of the proposed annexation: Provided further, That the election in the district to be annexed must be held within 90 days after the passage of the resolution by the board of the annexing district.

It shall be the duty of the secretary of the board of the district in which the election was held to file within 10 days after such election in said district a certified statement of the vote for annexation with the secretary of the board of the annexing district. Within 15 days after such election approving the annexation, the members of the board of the annexed district shall account to the board of the annexing district for the funds and property in their hands as such officers, and shall turn over the same to the board of the annexing district. All property and moneys belonging to the annexed district shall become the property of the annexing district and, except as hereinafter provided, all outstanding indebtedness of the annexed school district

shall become the liability of the annexing district. Upon receipt of such funds and property by the board of the annexing school district, the officers of the annexed district shall be released from liability therefor and their offices terminated. The effective date of annexation shall be the date of the annexation election: Provided, That if an election is required in the annexing district under section 437 of this act, the effective date of the annexation shall be the date of the election in the annexing district.

Except as herein provided, the annexation of 2 or more districts may be accomplished by concurrent proceedings and the elections in the annexed districts may be held on the same or different days. When the annexing district and any of the districts to be annexed have bonded indebtedness, which is to be mutually assumed at the time of the annexation as provided in sections 437 and 444 of this act, the annexation of each such district having bonded debt shall be by separate proceedings which shall not be concurrent with the proceedings for the annexation of any other district. When a district to be annexed has bonded debt which is to be assumed by the annexing district, the annexation of such district shall also be by separate proceedings, such proceedings shall not be concurrent with the proceedings by which any other district is annexed. Annexation proceedings for the annexation of 2 or more districts which have been heretofore completed or annexation elections which have been heretofore held concurrently or as part of a single annexation proceeding are hereby validated, ratified and confirmed with like force and effect as though such elections and proceedings had been fully authorized by statutes existing at the time.

Sec. 438. Any time after 3 years from the effective date of the annexation, where any one or more of the districts forming the combined district have outstanding bonded in-

debtedness incurred after December 8, 1932, the combined district may assume the obligation of such bonded indebtedness and pay the same by spreading a debt retirement tax levy uniformly over the territory of the combined district, whenever the electors of the combined district shall approve an increase in the constitutional limitation on taxes for that purpose sufficient to provide a total tax levy when such increase is applied to the latest available taxable valuation of the combined district equal to or greater than such total levy when applying the increase in the limitation on taxes available or pledged for the bond issue or issues to the latest available taxable valuation of the district or districts as such territory existed prior to the annexation and the school tax electors of the combined district shall approve the assumption of such bonded indebtedness. The assumption of the bonded indebtedness shall not operate to release the territory of the district originally incurring the bonded indebtedness from the final responsibility of paying the obligation or to rescind the increase in the limitation on taxes pledged to the bond issue or available for it in such district, nor be construed as so doing. The election may be held at any time following the effective date of annexation whenever a proposal is made to increase the bonded indebtedness of the combined district, and if such assumption of indebtedness is approved, it shall then become effective immediately. At the election to issue new bonds of the combined district, any outstanding bond issues of any or all of the original districts may be refunded as a part of the new bond issue and, in that event, it shall not be necessary to present the question of assumption of such indebtedness as a separate proposition. Where a school district is attached to another school district under the provisions of sections 440 to 443 of this act, the vote by the school electors of the combined district may be held at any time following the effective date of annexation.

Sec. 444. The authority and procedures prescribed in sections 433, 435, 437, and 438 of this act for the assumption of bonded indebtedness by an annexing or annexed school district, by both such districts or by a school district after annexation has become effective, shall apply to the assumption by either or both districts of any bonded debt which is not subject to the constitutional limitation on taxes: Provided, however, That the qualified school electors of the district or districts proposing annexation shall not be required to approve an increase in the tax limitation in respect to such bonded debt. The assumption of such unlimited tax bonded debt shall be approved by the school tax electors of either or both districts, as the case may be. In voting to assume the bonded debt of another school district, which has more than one issue of bonds outstanding, the school tax electors may approve the assumption of the bonded indebtedness represented by one or more of such bond issues.

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1967

No. 543

THE DETROIT EDISON COMPANY,
RALPH WERTZ and HERBERT KNACK,
Petitioners,

v.

EAST CHINA TOWNSHIP SCHOOL DISTRICT No. 3,
DONALD MacDONALD, LELAND SASS, MARY PHILLIPS, MILTON J. GEARING, EDWIN H. LINDOW,
MALCOLM G. SIMONS and WILLIAM HOPSON,
individually and as members of the Board of
Education of said school district,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF OF DEFENDANTS-RESPONDENTS

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents, East China Township School District No. 3, Donald MacDonald, Leland Sass, Mary Phillips, Mil-

ton J. Gearing, Edwin H. Lindow, Malcolm G. Simons and William Hopson, individually and as members of the Board of Education of said school district, respectfully file the following brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

## INTRODUCTION

The Appellees have no objection to the following subdivisions of the Petitioners' brief:

(a) Opinions in the courts below

(b) Jurisdiction of this court

(d) Constitutional provisions and statutes involved

(f-g) Alleged basis for federal jurisdiction

This brief contains a counter-statement of (c) questions presented for review, and (e) concise statement of the case.

## COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does a three-step state statute for school district annexation requiring: (1) initiation by resolution of the board of education of the annexing school district (2) approval of the proposed annexation by the State Superintendent of Public Instruction, and (3) a majority vote in favor of the annexation by the qualified school electors of the district or districts to be annexed, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

2. Does a state school statute authorizing a debt assumption election subsequent to such an annexation proceeding

violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, where the votes of all electors in the newly formed district have the same weight and are counted together on the question?

3. May a federal district court decline to take jurisdiction of a case under 28 U.S.C. §1343(3), upon a finding that the primary objective of the plaintiffs is to be relieved of taxes, a property rights claim, and not a claim of deprivation of personal rights?

4. Upon finding that a case involves essentially the claimed illegality of a state school property tax, and upon the further finding that the plaintiff has an adequate and effective remedy in the state courts, is a federal district court barred by 28 U.S.C. §1341 and the abstention doctrine from assuming jurisdiction?

## COUNTER-STATEMENT OF THE CASE

This case involves a three-step school district annexation proceeding under the section of the Michigan School Code set forth in the Petition for Writ of Certiorari (pp. 53-56) [hereinafter cited as Petition]. Each of the steps was precisely followed. The annexing school district's board of education initiated the proceeding by a proper board resolution. This was followed by approval of the proposed annexation by the State Superintendent of Public Instruction. Finally, a majority vote of the electors in the districts to be annexed approved the annexation.

The facts material to a legal determination of the case at bar are properly stated by the District Judge (Petition pp. 22-23) and the Sixth Circuit Court of Appeals (Petition pp. 42-43). Respondents respectfully adopt these statements of the two lower courts as their Counter-Statement of the Case.

## ARGUMENT

### I.

### The case is controlled by *Hunter* v. *Pittsburgh*

Petitioners are frank to admit at the outset that the authority of *Attorney General ex rel. Kies v. Lowrey*, 199 U.S. 233 (1905), has not been diminished by passing time, and that the Michigan legislature might have brought about this annexation and debt assumption "at its whim and caprice", to quote the words of the Petitioners (Petition p. 8). Yet, as we read the Petition, the chief claim now made by our opponents is that the leading case for this proposition, *Hunter v. Pittsbugh*, 207 U.S. 161 (1907), has somehow been undercut by the recent so-called "apportionment cases."

*Hunter* involved an annexation much like that carried out by the respondents in this action. Following the procedure outlined in a Pennsylvania statute, the electors of the City of Pittsburgh and the City of Allegheny voted together as to whether or not Allegheny should become a part of Pittsburgh. The majority of all votes cast in the two cities favored annexation, although a majority of the Allegheny voters were opposed. Thus the constitutional claims were virtually identical to those presented in this case. The Supreme Court decided the case with an opinion that spoke strongly of the power that states possess to change their various municipal subdivisions:

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers con-

> ferred upon these corporations and the territory over which they shall be exercised rest in the absolute discretion of the State. . . . The State, therefore, at its pleasure may modify or withdraw such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. *In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.*" 207 U.S. at 178-179. (Emphasis supplied).

The lesson of *Hunter* is, then, that the power of a state to alter boundaries of its political subdivisions is so great that the residents of the subdivisions cannot assert in opposition any right secured by the Federal Constitution. More specifically, residents of a school district have no vested rights in the continuation of that district with its boundaries unchanged. The states are thus permitted to respond as necessary to such local needs as shifts in population, changes in wealth, new methods of education, and other factors too numerous to mention. Any other result would "freeze" or stagnate local boundaries thereby thwarting the state in its paramount duty, that of providing the best government for *all* its citizens.

**The *Hunter* Doctrine Reaffirmed**

In his opinion below (Petition pp. 25-29), Judge Levin reviewed the most recent reapportionment cases, concluding that none of them has diminished the vitality of *Hunter*. He noted this Court's denial of certiorari in the recent case of *Hammonds v. City of Corpus Christi*, 343 F.2d 162 (5th Cir. 1965), *cert. denied*, 382 U.S. 837 (1965). In that case residents of a district annexed to the City of Corpus Christi complained of denial of equal protection in an annexation proceeding where they were denied *any* vote, direct or indirect. The Fifth Circuit affirmed the trial court's dismissal in an opinion that relied strongly upon *Hunter*. The various grounds stated for the dismissal, incidentally, show how closely the action of the trial court parallels that of the district court in this case:

> "(1) The annexation of lands to a City has been held without exception to be purely a political matter, entirely within the power of the State Legislature to regulate; (2) the Court has no power to either enjoin the collection of City taxes on the property annexed or to impound taxes already collected because there is a plain, speedy and efficient remedy in the Courts of Texas; (3) there is no diversity alleged and the amount in controversy is not alleged to be over $10,000.00; (4) there is no Federal question present; and (5) the Annexation Ordinances under attack here have already been upheld by the Texas Courts." 343 F.2d at 163.

Judge Levin then summarized *Hunter* and its application to the case at bar in the following language:

> "The foundation on which the Hunter doctrine has stood for half a century on the issue of annexation procedure is as sturdy as ever. This Court holds, therefore, that the school district annexation

> procedure of the Michigan School Code, which was followed by the original East China District in forming the combined district, is a purely legislative matter. It is not justiciable under the due process or the equal protection clauses of the Fourteenth Amendment to the Federal Constitution." (Petition p. 30).

On this subject, the Sixth Circuit's affirming opinion quoted with approval from *International Harvester Co. v. Kansas City*, 308 F.2d 35 (1962), *cert. denied*, 371 U.S. 948 (1963):

> "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. . . ." (Petition p. 48).

Petitioners attempt to resurrect in this court their claim that this case is somehow related to *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where Negroes were systematically excluded from the boundaries of the City of Tuskegee, Alabama. That case stands for the proposition that even the *Hunter* doctrine must yield when it can be enforced only at the expense of rights protected by the Fifteenth Amendment. It is fair to say, in fact, that *no* state action is permissible when taken because of the color of the citizens concerned. What possible significance can the *Gomillion* rule have, however, in this case? There is not even a hint of discrimination because of race, color, or creed. The District Court (Petition p. 25) and the Sixth Circuit (Petition p. 48) agree that *Gomillion* does not diminish the authority of *Hunter* in annexation procedure cases such as this one.

**The Reapportionment Cases are Inapplicable**

Petitioners next try to bring this tax case within the doctrine of such reapportionment cases as *Reynolds v. Sims*, 377 U.S. 533 (1964). Their argument was disposed of by Judge Levin in this succinct statement:

> "The right at stake in the reapportionment cases is that, in state representative government, the weight of the vote of a citizen in one electoral district be approximately equal to the weight of another citizen's vote in any other electoral district. A state may not create electoral districts which have a population disparity. But this is the only limitation the cases place upon the legislative power of a state to define political boundaries. They create no constitutional rights in affected citizens concerning the *procedure* for creating or altering these districts." (Petition pp. 27-28).

The Sixth Circuit Court of Appeals affirmed the district court's determination on this point.

**Representative Government and Local Government Guidelines**

At this late stage of the case, the Petitioners attempt to give a fresh appearance to their familiar arguments with the claim that the board members of the former East China School District having been elected prior to any movement toward annexation and debt assumption, "were not true spokesmen for their constituents on these issues." (Petition p. 9). No allegation of constitutional infringement is made on this point, nor are cases cited in support thereof. Such a position is clearly contrary to the principles of rep-

resentative government. To carry Petitioner's argument to its logical conclusion, every representative body of government, from the United States House of Representatives to the smallest local council, would have to recess for elections each time a new issue was encountered. Such a claim hardly deserves a serious response.

The three-step annexation procedure of the Michigan School Code (Petition p. 53) comes within the guidelines for flexible local government reorganization set forth by this Court in the recent decision of *Sailors v. Kent Bd. of Educ.*, — U.S. —, 18 L.ed.2d 650 (1967). This Court may well have had the doctrine of *Hunter v. Pittsburgh* in mind when it stated:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects non-legislative officers, a state can appoint local officials or elect them, or combine the elective and appointive systems as was done here." 18 L. ed. 2d at 655.

We note in passing that the Board of Education for Kent County in the *Sailors* case could transfer areas from one school district to another, a power that can scarcely be distinguished from that of the former East China School Board to initiate the annexation proceeding involved in this case.

## II.

### The Burdens Imposed by the Debt Assumption Proceeding are Not Justiciable

The district court held that the burdens imposed by the debt assumption proceeding were non-justiciable and not in violation of any Federal constitutional guarantee. (Petition pp. 31-32). Even if the jurisdictional requirements had been met, however, the Court decided that there were grounds for dismissing the action under the "abstention doctrine" (Petition pp. 39-40). The Sixth Circuit affirmed by saying:

> "With respect to the constitutional issues concerning the debt assumption proceedings (i.e., that the procedures employed pursuant to state statute were violative of the due process and equal protection clauses of the Fourteenth Amendment, and that the tax imposed as a result thereof was so disproportionate to the benefits received as to amount to confiscation), the District Court's determination based on application of the abstention doctrine will be affirmed, although the court's conclusions on both these issues on the merits is also deemed correct." (Petition p. 49).

The principles set forth in *Hunter* had previously been applied with like effect in two cases that decided a state has power to increase or decrease the area burdened with existing debt. These two cases, *Laramie County v. Albany County*, 92 U.S. 307 (1875), and *Attorney General ex rel. Kies v. Lowrey*, 199 U.S. 233 (1905), stand even today as unassailable authority in support of a state's power to alter municipal boundaries, although the change may result in higher tax bills for the residents concerned. Such matters are simply not justiciable under the Fourteenth Amendment.

At issue in *Laramie* was the division of a Wyoming county under circumstances that subjected certain residents to a greater per capita debt without affording them a vote on the proposition. The Wyoming legislature had created two new counties out of the western portion of Laramie County, thereby reducing the area of that county by more than two-thirds of its original size. The bulk of taxable property was thus transferred to the new county, without any provision for the new county to assume its pro rata portion of the debt of the original county. The Supreme Court affirmed dismissal of a suit to compel the new county to pay a portion of the debt. The constitutional claim was denied in broad terms:

> "Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretention to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable." 92 U.S. at 311-12 (Citations omitted).

*Kies v. Lowrey* was a Michigan school district case. A new district had become liable under state law for the debts

of its predecessors. It was the claim of the plaintiffs that the creation of the new district under these circumstances violated, among other things, the due process clause of the Fourteenth Amendment. Affirming the dismissal, the Supreme Court held that the case was controlled by *Laramie*.

### The Corporate Petitioner's Voting Rights Claim Is Self-Defeating

Not only are the reapportionment cases inapposite to the facts now before the Court, the Petitioners are actually in the same position as the losers, not the winners, of those cases! Our opponents are asking this Court to order groupings of electors on the basis of prior political boundaries and to assign a different weight to the votes in a particular group, a practice forbidden by the reapportionment cases. The District Court said on this point:

> "A fortiori, the 'one-man, one-vote' command applies to direct suffrage such as in the debt assumption. The proposed grouping is no more legitimate than the rejected rural-urban groupings [in the reapportionment cases]." (Petition p. 32)

The Petitioners thus seek nothing less than a veto power for their minority group over all annexations and debt equalizations in East China School District.

## III.

### 28 U.S.C. §1343(3) Does Not Make Every Case a Subject for Federal Jurisdiction

There is no jurisdictional windfall in 28 U.S.C. §1343(3) for every complainant who seeks to try his luck in federal court. The requirements of 28 U.S.C. §1331(a) concerning jurisdictional amount would have no meaning if a litigant could simply, by asserting constitutional grounds, obtain federal jurisdiction to try a question of property rights. The same abuse would also vitiate the Johnson Act, 28 U.S.C. §1341, and its prohibition against suits to block state taxes.

Judge Levin explained why the individual plaintiffs are not entitled to civil rights jurisdiction under 28 U.S.C. §1343(3):

> "A major purpose of Civil Rights jurisdiction is to redress the deprivation of constitutional rights which have no pecuniary valuation. To entertain jurisdiction under 28 U.S.C. §1343(3) over essentially property claims only because the plaintiff alleges a constitutional deprivation, could lead to a widespread circumvention of 28 U.S.C. §1331a with its jurisdictional amount limitation. *Hague v. C.I.O.*, 307 U.S. 496, 531-532, 59 S. Ct. 954, 83 L. Ed. 1423 (1939). See also *Pierre et al. v. Jordan*, 333 F.2d 951 (9th Cir. 1964)." (Petition p. 37)

The Sixth Circuit did not discuss the civil rights jurisdictional question. It held with respect to the annexation issue that no claim was stated upon which relief could be granted and that the abstention doctrine applied to the debt assumption issues (Petition pp. 45, 51).

Attempts to invoke civil rights jurisdiction in cases that are truly state tax cases have not been successful. *Reiling*

*v. Lacy*, 93 F. Supp. 462 (D. Md. 1950); *Abernathy v. Carpenter*, 208 F. Supp. 793 (D. Mo. 1962), *aff'd*, 373 U.S. 241 (1963); *Pierre v. Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965); and *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966).

In *Gray v. Morgan* the plaintiffs sought to invoke civil rights jurisdiction through the equal protection and due process guarantees of the Federal Constitution in an action to have a Wisconsin state income tax declared unconstitutional. The Seventh Circuit found there was no civil rights jurisdiction, pointing out that the plaintiffs had failed to cite any case where 28 U.S.C. §1343 provided federal jurisdiction in a suit for relief against a state tax. We note that the present petitioners, too, lack any authority for their claim. The Court went on to review the history and application of the civil rights jurisdictional statute:

> "Under the circumstances present here, we find nothing in the history of construction of the civil rights statute, §1343, to indicate its concern with the validity of a state tax as a revenue measure. Thus far, at least, it is quite clear that the courts have generally treated this statute as applicable to personal liberty rather than a property or monetary claim." 371 F.2d at 175.

The opinion also relied upon *Abernathy v. Carpenter* and *Hague v. CIO* in disposing of the plaintiffs' claim for Section 1343 jurisdiction.

The justification for jurisdictional restraint in Section 1343 cases was set forth in *Deloach v. Rogers*, 268 F.2d 928 (5th Cir. 1959). Jurisdiction had not been conferred upon the federal district courts, the opinion said, for the redress of every violation of rights guaranteed by the United States Constitution. After all, any constitutional question properly raised in a state court will ultimately

come to the United States Supreme Court for decision. In refusing to take jurisdiction under Section 1343 of a claim based on an assault at the hands of a county sheriff, the Fifth Circuit made the following statement:

> "With an apparent concession that the authorities thus far decided do not sustain his claim that there is Federal jurisdiction in this case, the appellant urges that recent decisions have shown an enlarging concept of Federal rights jurisdiction. The cases cited are all based upon racial discrimination. These fall within the 'equal rights' provision of 28 U.S.C.A. 1343(3). There is a complete absence of any suggestion in the pleadings of the appellant of any discrimination by reason of class or race." 268 F.2d at 930.

It need hardly be added that no claim of racial discrimination has been made in this case.

## IV.

### The Provisions of 28 U.S.C. §1341 Bar Federal Court Jurisdiction in This Case

The district court recognized that the Johnson Act, 28 U.S.C. §1341, prohibits the federal courts from granting injunctive relief in suits involving the assessment, levy or collection of taxes under state law and requires a like restraint in the use of the declaratory judgment procedure (Petition pp. 38-39); *Great Lakes Dredge & Dock Company v. Huffman*, 319 U.S. 293 (1943). After finding that Michigan provides a "plain, speedy and efficient" remedy in the state courts for persons attacking any tax under state law, the court decided that all elements were present for application of the abstention doctrine:

> "While the plaintiffs urge various constitutional claims, the Court cannot close its eyes to the relief sought. This is a tax case. The Court has been presented with no consideration of policy and no exceptional circumstances which should make the abstention doctrine inapplicable" (Petition p. 39).

This holding was specifically affirmed by the Sixth Circuit.

The abstention doctrine established in *Great Lakes Dredge & Dock Co. v. Huffman,* when applied to state tax cases, is one of true, total and complete abstention. This policy is to be distinguished from the discretionary abstention doctrine identified with the leading case of *Railroad Comm. v. Pullman Co.,* 312 U.S. 496 (1941). The type of abstention defined in *Pullman* is applied at the discretion of individual judges within established limits, but only in non-tax cases. In contrast, the *Great Lakes* abstention doctrine affirmatively requires federal judges to decline jurisdiction in *all* state tax cases.

The duty of federal courts to decline jurisdiction in state tax cases was recently explained again in *Zenith Dredge Co. v. Corning,* 231 F. Supp. 584 (D. Wis. 1964). There the Court declined jurisdiction of plaintiff's declaratory judgment action to have a Wisconsin withholding tax law declared invalid as to foreign corporations. The Court distinguished the two types of abstention in this passage:

> "Plaintiffs have cited *England v. Louisiana State Board of Medical Examiner's,* 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 440 (1964). That case is not in point. *England* was not a §1341 (Johnson Act) case. It was an action for declaratory judgment and injunction that the Louisiana Medical Practice Act as applied to the plaintiffs contravened the Fourteenth Amendment. A three-judge court invoked the doctrine of abstention, the basis for such action being that 'The State Court might effectively

> end this controversy by a determination that chiropractors are not governed by the statute.'
>
> "The present case is an example of 'true abstention', as that concept is defined by Justice Douglas in his concurring opinion in *England*. An example of true abstention is where '[a] Federal Court declines to entertain an action for declaratory relief against state taxes because of the federal policy against interfering with them by injunction.' " 231 F. Supp. at 587.

The following cases follow the same rule of declining federal jurisdiction in declaratory judgment actions involving the alleged unconstitutionality of state tax statutes. *City of Houston v. Standard-Triumph Motor Co.*, 347 F.2d 194 (5th Cir. 1965); and *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966).

In their discussion of the abstention doctrine (Petition p. 18), the Petitioners advert to the pendant jurisdiction doctrine represented by *Bell v. Hood*, 327 U.S. 678 (1946), and *Hurn v. Oursler*, 289 U.S. 238 (1933). The Court will certainly recognize, though, that pendant jurisdiction has nothing to do with this case. For when the lower courts considered the abstention question, they had to *assume* that there would be federal court jurisdiction, if only one of the issues had not been a state tax matter.

The Petitioners could not invoke pendant jurisdiction, though, even if the abstention doctrine did not apply to this state tax case. Where federal claims are disposed of at preliminary stages of a federal district court proceeding, as in the case at bar, claims based upon pendant jurisdiction will also be dismissed. *T. B. Harms Co. v. Eliscu*, 339 F. 2d 823 (2nd Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); *McFaddin Express, Inc. v. Adley Corp.*, 346 F. 2d 424 (2nd Cir. 1964); *Carliner v. Fair Lanes, Inc.*, 244 F. Supp.

25 (D. Md. 1965); *Hoover v. Allen*, 241 F. Supp. 213 (D. N.Y. 1965).

The Petitioners assert loftily (Petition p. 17) that a decision in their favor would not mean "any disruption of the state's general finances". They may well be right, but what earthly importance is there in this fact? East China School District levied the taxes we are concerned with, not the State of Michigan, and it is the district that has been forced to borrow large sums from the State to meet the deficit brought about by refusal of the corporate petitioner to pay its considerable share of anticipated tax revenues.

While Detroit Edison may find that it can adopt a detached view of this proceeding, the school district cannot. The district must support its schools in the face of long drawn out litigation that has tied up a large share of needed income. It is precisely this situation, in fact, that first gave rise to the abstention doctrine. The uncertainty of affairs in the school district, too, which is suddenly a matter of concern to the Petitioners (Petition p. 17), will be cured if this action is terminated and they are required to follow the less disruptive practice of paying their assessed taxes to the district, and then suing for a refund in the state courts.

## RELIEF REQUESTED

The Respondents respectfully pray that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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